No. 12139

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANGEL L. PACK,

Appellant,

vs.

UNITED STATES OF AMERICA AND LILLY PACK,

Appellees.

BRIEF OF APPELLANT.

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Jurisdiction.

(a) *Of the District Court.* This action was filed in the District Court by the appellant, plaintiff, Angel L. Pack, as plaintiff, against the appellees, United States of America and Lilly Pack, under the National Service Life Insurance Act of 1940, as amended (Title 38, Chap. 13, U. S. Code). Section 617 of the Act (Sec. 817, Title 38, U. S. C. A.), as amended August 1st 1946, incorporates and adopts by reference, Section 445 of Title 38, U. S. Code, which, in turn, vests exclusive jurisdiction in the District Court in the district where any person claiming under such insurance resides. Any person claiming to have an interest under such insurance may be made a party to such suit, wherever they may reside.

The complaint [Tr. 2-7], the answer of appellee United States [Tr. 7-11], the answer and cross-claim (called "cross complaint") of appellee Lilly Pack [Tr. 11-16], and the answers thereto of appellant [Tr. 16-17] and of appellee United States [Tr. 18-19], the oral stipulation of the parties [Tr. 33-36], and Findings of Fact [Tr. 19-26], all clearly establish that at and prior to the commencement of the action, there was a disagreement under a contract of insurance between the Veterans Administration and appellant, that she was a resident of the Southern District of California, and that Lilly Pack claimed to have an interest in such insurance.

Jurisdiction as to the claim of Angel, appellant, against Lilly, appellee, is not only founded upon Sections 817 and 445, Title 38, U. S. Code, as aforesaid, but also on Sections 1331 and 1332, Title 28, U. S. Code, as amended (Sec. 41, Title 28, U. S. C. A., 1927 Ed., subd. (1), Judicial Code, Sec. 24, prior to the effective date of new Judicial Code). The amount exceeds $3,000.00, Angel is a citizen of California [Tr. 22, par. VIII], and Lilly is a citizen of Missouri [Tr. 22-23, par. X].

(b) *Of the Court of Appeals for the Ninth Circuit.* Appellant has taken this appeal from the final judgment [Tr. 28-30] entered on September 22nd 1948, and notice of appeal was filed November 19th, 1948, within the time provided by Section 2107, Title 28, U. S. Code (the United States being a party). The Court of Appeals has jurisdiction to review the final decision (judgment) in question, under Sections 1291 and 1294, subd. (1), Title 28, U. S. Code.

Statement of the Case.

There is no dispute between the parties as to the facts, as follows:

Clyde A. Pack married appellant, Angel L. Pack, in California, on June 24th, 1932, both then being residents of California and at all times thereafter remained husband and wife, and residents of said state, until the said marriage and the residence of Clyde was terminated by his death on June 11th, 1945. There were two children as the issue of said marriage, both of whom survived their father.

Clyde enlisted in the U. S. Marine Corps on February 25, 1944, and was in active service therein until his death. While a member thereof, he applied for and was granted by the appellee United States, through its Veterans Administration, $10,000 of National Service Life Insurance, effective March 6th, 1944, under certificate N-15,813,803, for which he designated the appellee Lilly Pack, as beneficiary, *without the consent of appellant, his wife.* Lilly Pack was his mother and no contingent beneficiary was named.

All of the premiums called for under the terms of said insurance were paid in the amounts and at the times as provided by law and the terms of said insurance, and said insurance was in full force and effect when it matured upon Clyde's death.

All of such premiums were paid out of the earnings of Clyde, appellant's husband, which earnings were the community property of Clyde and appellant.

Clyde at no time executed any change of beneficiary.

Appellee Lilly Pack is a resident of Missouri and claims an interest in such insurance, as the named beneficiary, adverse to the claims of appellant.

Appellant, Angel L. Pack, after the death of Clyde, made written demand to the appellee, United States of America and to the Veterans Administration thereof, for payment to her of the proceeds of said insurance, and on August 25, 1947, and prior to the filing of said complaint, said appellee and its Veterans Administration disagreed with appellant and refused to pay her claim or any part thereof, and that a disagreement exists between appellant and said appellee as to her claim.

Not any of the proceeds under said insurance have been paid to either Angel L. Pack or Lilly Pack, or to anyone else.

So much for the agreed and undisputed facts.

The District Court, in addition to the foregoing, found that although the insurance premiums were paid and said insurance was purchased wholly by and from the community property of Clyde and Angel, his wife [Tr. 24, par. II, and the second par. II, Tr. 24]:

(1) That Angel, nevertheless, had and has no interest in the insurance here involved [Tr. 22-23, par. X]; and

(2) That Lilly does not hold and will not hold any part of the proceeds of said insurance in trust for plaintiff, but that all such proceeds are and will be the absolute property of Lilly, free from any trust in favor of Angel [Tr. 25, par. III].

In its Conclusions of Law [Tr. 26-28] the District Court held contrary to the contentions of appellant:

(1) That insurance issued under the National Service Life Insurance Act is not subject to the community property laws of California and that disposition of the proceeds of such insurance cannot be controlled or governed by such laws [par. III];

(2) That such proceeds must be paid "according to the terms of said contract" (*i. e.,* only to Lilly as named beneficiary [par. IV]);

(3) That appellant take nothing by her complaint [par. V] and that she has no right, title or interest therein or to any of the proceeds [par. VI];

(4) And awarded the entire insurance to Lilly as named beneficiary [par. VII] subject to her attorneys' fees [par. VIII].

Specifications of Errors.

The District Court erred:

1. In making the following Findings of Fact, in that not any of said findings are supported by the evidence or by law:

(a) In finding [Tr. 22-23, par. X] that appellant had and has no interest in the insurance and in failing to find that the insurance was the community property of Clyde and appellant and that appellant had a vested one-half interest therein;

(b) In finding that appellee Lilly Pack, does not hold and will not hold any part of the proceeds from such insurance in trust for plaintiff [Tr. 25, par. III], and in failing to find that appellee Lilly Pack, holds and will hold an undivided one-half of all of the proceeds in trust for appellant, and that she deliver the same, as received, to appellant.

2. In not finding:

(a) That the insurance was the community property of Clyde and appellant and that appellant had and still has a vested one-half interest therein;

(b) That appellee Lilly Pack is the trustee of appellant and that she is required to deliver one-half of all proceeds, as received, to appellant;

(c) That appellee, Lilly Pack, be required to execute an assignment to appellant of a one-half undivided interest or as to $5,000 of such insurance.

3. In making certain Conclusions of Law [Tr. 26-28], such conclusions being unsupported either by the evidence or by law:

(a) In concluding that the disposition of the proceeds is not subject to or controlled or governed by the com-

munity property laws of California [Tr. 26-27, paras. III and IV];

(b) In concluding that appellant was entitled to take nothing and has no right or claim in or to the insurance or its proceeds [Tr. 27, paras. V and VI];

(c) In concluding that appellee, Lilly Pack, is entitled to receive the entire benefits of said policy [Tr. 27, par. VII].

4. In failing to conclude:

(a) That the insurance was the community property of appellant and Clyde and that she had and has an undivided one-half interest therein, and directing the entry of judgment accordingly, or

(b) That the insurance was the community property of appellant and Clyde, and that as between appellant and appellee Lilly Pack, that the latter holds and will hold an undivided one-half of all proceeds therefrom in trust for appellant, directing that said appellee deliver one-half of all such proceeds forthwith to appellant, upon receipt thereof, and directing that such appellee make an assignment of one-half, or $5,000, of said insurance to appellant, and upon her failure so to do, to direct the Clerk of the Court to execute such assignment for her; and

(c) That appellee Lilly Pack, was estopped from claiming any right or interest in said insurance or its proceeds to the extent of appellant's (one-half) community interest therein.

5. In awarding judgment against appellant, said judgment not being supported by the evidence and against law and in not awarding judgment in favor of appellant, in accordance with the findings it should have made and the conclusions it should have rendered as aforesaid.

ARGUMENT.

Summary of Argument.

I.

The insurance was community property and the surviving widow had a vested interest in one-half thereof.

II.

As between the widow and the named beneficiary, the latter would hold one-half of the proceeds in trust for the widow, and may be required to make an assignment of a one-half interest to the widow.

I.

The Insurance Was Community Property and the Surviving Widow Had a Vested Interest in One-Half Thereof.

A. *The insurance was community property.* It was stipulated, and the Court found, that Clyde, the insured, and Angel, his wife, were married in California in 1932, and were residents thereof, and husband and wife, at all times thereafter until the relationship was terminated by Clyde's death in 1945; and that all the premiums paid in the purchase of the insurance on Clyde's life, purchased by him in 1944 (during such coverture) were paid from and by community income. The insurance therefore was the community property of appellant (Angel) and Clyde.

3 Cal. Jur. Supp. (1926-36), "Community Property," Sec. 30, pp. 509-511;

114 A. L. R. 546-548, II a, "California";

Re Perkins (1943), 21 Cal. 2d 561, 134 P. 2d 231;

Grimm v. Grimm (1945), 26 Cal. 2d 173, 157 P. 2d 841;

Civil Code, California, Secs. 161a, 164 and 172;

Wissner v. Wissner (1949), 89 A. C. A. ....., 201 P. 2d 837.

B. *The widow (appellant) is therefore entitled to one-half of the proceeds of the policy.* There is no question that the husband, Clyde, could make a gift of his one-half interest in the community life insurance policy, by naming his mother, the appellee, Lilly, and that even had he named his wife Angel, as beneficiary, he was free to change such designation of beneficiary without her consent. But he could not and did not, by naming Lilly as beneficiary, divest his wife of her community interest therein, without her consent.

Traveler's Ins. Co. v. Fancher (1933), 219 Cal. 351, 26 P. 2d 482;

McBride v. McBride (1936), 11 Cal. App. 2d 521, 54 P. 2d 480;

3 Cal. Jur. Supp. (1926-36), "Community Property," Sec. 30, pp. 509-511;

Civil Code, California, Secs. 161a, 164 and 172;

Wissner v. Wissner (1949), 89 A. C. A. ....., 201 P. 2d 837.

The Court expressly found that appellant Angel, at no time consented to the naming of appellee Lilly, as beneficiary [Tr. 21, par. V].

It may be conceded that *had* the defendant United States made payment to the named beneficiary Lilly, before being advised of appellant's claim to one-half of the insurance as *her* (Angel's) property, it would not have been subjected to liability for double payment. But such is not the case here. No payments have been made to anyone and the Government is fully advised as to Angel's claim, and all will concede that it will be fully protected, with both claimants before the Court, if the judgment is reversed and the trial court is directed to enter judgment in favor of Angel as to her one-half of such insurance.

The judgment of the trial court deprived appellant of her property without compensation and any Act of Congress which it is claimed justifies the taking of her property, in which she had a vested interest (to-wit: one-half of the insurance), would be wholly void and beyond the powers of Congress to enact.

Fifth and Tenth Amendments, U. S. Constitution;
Wissner v. Wissner (1949), 89 A. C. A. ....., 201 P. 2d 837 (and cases therein cited).

II.

As Between the Widow and the Named Beneficiary, the Latter Would Hold One-Half of the Proceeds in Trust for the Widow, and May Be Required to Make an Assignment of a One-Half Interest to the Widow.

A. *Where, as here, a husband names a third party (here, his mother), as beneficiary under community life insurance, a trust was created as to its proceeds.* Whether or not a true "trust" arises, if the proceeds are paid to appellee, Lilly, she will be receiving property belonging to appellant Angel, to the extent of one-half of the proceeds, and may be required to deliver such part to appellant, the purported gift of one-half of the community property to the insured's mother being wholly invalid.

Wissner v. Wissner (1949), 89 A. C. A. ....., 201 P. 2d 837;

New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 Pac. 61;

Civil Code, California, Secs. 161a, 164 and 172;

McBride v. McBride, 11 Cal. App. 2d 521, 54 P. 2d 480;

McElroy v. McElroy (1948), 32 A. C. 873, 198 P. 2d 683.

Thus, even if it should be determined, as a matter of law, that appellant's Point I, while sound, would avail her nothing, nevertheless, where the husband had power to designate his mother, Lilly, as beneficiary only as to *his* one-half of the insurance, Angel may cause a trust to be

impressed on the proceeds under her second cause of action as against Lilly.

Wissner v. Wissner (1949), 89 A. C. A. ..... 201 P. 2d 837;

Calhoun v. Ussery (1930), 46 F. 2d 495;

Ambrose v. U. S. (1926), 15 F. 2d 52;

Kaschefsky v. Kaschefsky (C. C. A. 6, 1940), 110 F. 2d 836;

Duncan v. Linton (1929), 38 Ohio App. 57, 175 N. E. 621 (petition in error dismissed 121 Ohio St. 615, 172 N. E. 377];

Christensen v. Christensen (1926), 14 F. 2d 475;

Noble v. Andrea (1927), 141 S. Car. 168, 139 S. E. 403.

The foregoing and other similar cases all concerned Government life insurance.

It should be remembered that Clyde is presumed to have known the law—that by virtue of Sections 161a, 164 and 172 of California's Civil Code, the insurance would be community property, and that he had no power to divest his wife of her one-half interest therein without her consent. It must also be presumed that he did not intend to defraud his wife of her interest therein. Consequently, when he named his mother as beneficiary, without his wife's consent, it must be presumed that he intended that such designation should apply only to the one-half over which he had the power to designate a third party, as beneficiary, to the same effect as if he so announced his intention, and that he intended that his wife Angel, received the other one-half.

The foregoing is fortified by the fact that Clyde, in applying for a $10,000 single policy, could *name* but *one* principal beneficiary (see *Kaschefsky* case above), and it must be assumed that, therefore, he named his mother, knowing that his wife, under California law, would receive one-half of the proceeds without being named.

B. *Lilly should be required to assign a one-half interest in the insurance to appellant.* Clyde, during his lifetime, was trustee for his wife as to her one-half of the community property, in that he had no power to make a gift thereof. To let the judgment stand, will be but to sanctify an unjust enrichment in Lilly, and under the circumstances she should be required to make restitution.

McElroy v. McElroy (1948), 32 A. C. 873, 198 P. 2d 683 (and cases therein cited);

Wissner v. Wissner (1949), 89 A. C. A. ....., 201 P. 2d 837 (and cases therein cited);

Restatement, "Restitution," Sec. 1, and 1940 Pkt. Supp. "Calif. Annotations";

Restatement, "Trusts," Vol. 2, Sec. 292(1).

It is now settled that under *Rules 1 and 2, FRCP,* a District Court, in a civil action, may give full relief.

Lilly could make a voluntary assignment as to one-half of the insurance to her son's widow, the appellant, no payments having so far been made to Lilly.

38 U. S. C. A., Section 816:

> (". . . assignments of . . . any part of the beneficiary's interest may be made by a designated beneficiary to a widow . . . of the insured . . . if the assignment is delivered to the Veterans Administration before any payments of the insurance shall have been made to the beneficiary"), as amended August 1, 1946.

Thus, even *if* this Court holds that appellant's Point I is not effective as against the Government, nevertheless as between the contestants (Angel and Lilly), under its equity powers, acting *in personam*, the District Court may be directed to enter a judgment requiring Lilly to execute the assignment and that Court will have power to enforce such a decree, as is illustrated by the principles set forth in:

Taylor v. Taylor, 192 Cal. 71, 218 Pac. 756;

In re Barreiro's Estate, 125 Cal. App. 752, 14 P. 2d 786.

Congress has expressly conferred jurisdiction upon the District Courts to hear and determine *all* controversies between persons claiming some right under a contract of Government insurance and to determine the interests of each claimant, particularly where, as here, the United States admits liability under the policy.

Secs. 445 and 817, Title 38, U. S. C. A.

There can be no doubt but that with the parties before it, the Superior Court of the State of California would have power to require Lilly to pay one-half of the insurance to Angel and make an assignment as to a one-half interest to her.

McElroy v. McElroy (1948), 32 A. C. 873, 198 P. 2d 683, and that, the District Court having jurisdiction over such parties *in personam,* was bound to apply the law under the admitted facts, in accordance with that of the State of California, at least insofar as the controversy between them was concerned.

Wissner v. Wissner (1949), 89 A. C. A. ....., 201 P. 2d 837.

Conclusion.

It is respectfully submitted that in the total absence as to conflict as to the facts (they having been stipulated to by all parties):

1. That the District Court erred in not finding that the insurance was the community property of Angel and Clyde, and awarding to Angel a one-half interest therein (to-wit: awarding her $5,000 of the $10,000 of insurance);

2. Or, even if, as held by the District Court (which holding appellant urges was error), the community property rights of appellant were inapplicable in an action against the United States, nevertheless, that as between the benficiary (appellee Lilly) and the widow (appellant Angel), the District Court erred in not determining that Lilly was a trustee, as between herself and Angel, as to one-half of the insurance, and requiring Lilly to assign a one-half interest to Angel, and in not entering judgment accordingly.

Dated: February 23rd, 1949.

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